

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-2008

B
P/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
GOVERNMENT OF THE UNITED STATES ex rel. :
ROBERT SHABAN, :

Petitioner-Appellee, :

-against- :

75-2008

STANLEY ESSEN, Director of the Brooklyn
Rehabilitation Center, New York State :
Drug Abuse Control Commission, :

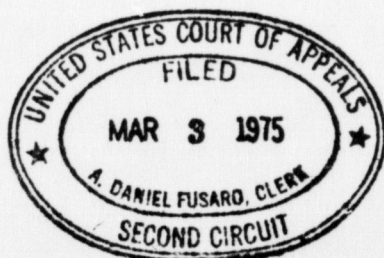
Respondent-Appellants. :

-----X

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

APPENDIX FOR APPELLANTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellants
Office & P.O. Address
Two World Trade Center
New York, New York 10047



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>PAGE</u>
1. Relevant Docket Entries.....	A-1
2. Petition for Writ of Habeas Corpus.....	A-2
3. Portion of Stenographic Minutes dated December 20, 1974 (cover sheet and pp. 19-22).....	A- 26
4. Portions of Stenographic Minutes dated December 24, 1974 (cover sheet and pp. 13-20; 28-29; 38; 42-45; 52-59).....	A- 31
5. Opinion sustaining writ.....	A- 56
6. Order sustaining writ.....	A- 62

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
GOVERNMENT OF UNITED STATES ex rel. :
ROBERT SHABAN :

-against-

STANLEY ESSEN, Director of the Brooklyn :
Rehabilitation Center New York State :
Drug Abuse Control Commission :

: 74 C 1760

-----X
Document Page No.

Certified Copy Docket Entries	A-B
Petition for Writ of Habeas Corpus	1
Order that a Writ issue for production of the body, etc.,	2
Order that a Writ issue for production of the body	3
Writ returned and filed	4
Order sustaining Writ	5
Opinion sustaining Writ	6
Copy of Letter of Clerk addressed to Joel Brettchneider, Esq. re enclosure of copy of memo	7
Notice of Appeal	8
Stenographic Minutes dated December 24, 1974	9
Stenographic Minutes dated December 20, 1974	10
Clerk's Certificate	11
Unfiled Documents	
Memorandum of Law	X

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RECEIVED
DEPARTMENT OF JUSTICE
DEC 17 1974

NEW YORK CITY OFFICE

74 C 1760

----- -X
GOVERNMENT OF THE UNITED STATES

ex rel ROBERT SHABAN

-against-

STANLEY ESSEN, DIRECTOR OF THE
BROOKLYN REHABILITATION CENTER
NEW YORK STATE DRUG ABUSE CONTROL
COMMISSION

Respondent.
----- -X

Upon reading the verified petition of Joel H. Brettschneider,
attorney for Robert Shaban, and good cause appearing therefore,

It is ORDERED

That a writ of habeas corpus issue out of this court
directing the production of the body of said ROBERT SHABAN before
the Court on the 20th day of December, 1974, at 11 A.M.

Copies of these papers must be served on or before 5P.M.
on December 18, 1974 on

- 1) New York State Attorney General,
- 2) District Attorney for Kings County, and
- 3) Any other attorney representing New York State at
hearing before Mr. Justice Williams.

/s/ Thomas C. Platt
U.S.D.J.

December 16, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GOVERNMENT OF THE UNITED STATES
ex rel ROBERT SHABAN

- against -

STANLEY ESSEN, DIRECTOR OF THE
BROOKLYN REHABILITATION CENTER,
NEW YORK STATE DRUG ABUSE
COMMISSION

WRIT OF HABEAS CORPUS

Respondent

The President of the United States of America

TO: STANLEY ESSEN, DIRECTOR OF THE BROOKLYN REHABILITATION
CENTER, or any other person having the body of ROBERT
SHABAN in custody.

G R E E T I N G:

We command you, that you have the body of ROBERT SHABAN, by
you imprisoned and detained, as it is said, with the time and cause
of such imprisonment and detention, before me, or one of the judges
on the United States District Court for the Eastern District of
New York, at Room 7, in the Federal Building, 225 Cadman
Plaza East, in the Borough of Brooklyn, City and State of New York
on the 20th day of December 1974, at 11 o'clock in the
forenoon of that day or as soon thereafter as counsel may be heard
so as to do and receive what shall then and there be considered
and adjudged and concerning the said ROBERT SHABAN and have you
then and there this writ.

Witness Honorable THOMAS C. PLATT, Judge of the United States
District Court for the Eastern District of New York, at the Federal
Building, in the Borough of Brooklyn, City and State of New York,
on the 17th day of December 1974

Dated December 17, 1974

Joel H. Brettschneider

by
Clerk

JOEL H. BRETTSCHEIDER,
Attorney for Petitioner
26 Court Street
Brooklyn, N.Y. 11242

Thomas C. Platt

U.S.D.J. Clerk

MARIE R. BARNETT

Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GOVERNMENT OF THE UNITED STATES

ex rel ROBERT SHABAN

- against -

STANLEY ESSEN, DIRECTOR OF THE
BROOKLYN REHABILITATION CENTER
NEW YORK STATE DRUG ABUSE CONTROL
COMMISSION

Respondent

Upon reading the verified petition of Joel H Brettschneider,
attorney for Robert Shaban, and good cause appearing therefore,

It is ORDERED

That a writ of habeas corpus issue out of this court
directing the production of the body of said ROBERT SHABAN before
the Court on the 20th day of December 1974 at 11 A.M.

THOMAS C PLATT
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GOVERNMENT OF THE UNITED STATES
ex rel. ROBERT SHABAN

- against -

P E T I T I O N

STANLEY ESSEN, DIRECTOR OF THE
BROOKLYN REHABILITATION CENTER
NEW YORK STATE DRUG ABUSE CONTROL
COMMISSION

Respondent

STATE OF NEW YORK
COUNTY OF KINGS

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

The petition of JOEL H. BREITSCHEIDER, respectfully shows to
this Court as follows:

1st. Your petitioner is an attorney duly admitted to practice
in the Courts of the State of New York and the Federal Courts, and
is the attorney for the said ROBERT SHABAN. Your petitioner has
been authorized by Robert Shaban and his mother, Violet Shaban to
make this petition for a writ of habeas corpus.

2nd. That the said Robert Shaban is a citizen of the United
States and a resident of the County of Kings, State of New York
in this district where he has lived for over eighteen years.

3rd. That the said Robert Shaban is now imprisoned and
restrained of his liberty in the Brooklyn Central Rehabilitation
Center, 55 Hansen Place, in the County of Kings, Borough of
Brooklyn, City and State of New York, in the custody of Stanley
Essen, Director of the Brooklyn Central Rehabilitation Center
under the jurisdiction of the New York State Drug Abuse Control
Commission.

4th. The cause or pretense of such imprisonment and restraint is not known to your petitioner. Your petitioner and his attorney, however, verily believe that Robert Shaban is being held as a violator of a Supreme Court Certification of Addiction made and entered in the Supreme Court in July 1972.

5th. That upon information and belief, although the said Robert Shaban was certified an addict in 1972, he was released from "In-resident" status in December from the then Narcotics Addict Control Commission at the Arthur Kill facility in December 1972 to an "out-patient" or "after-care" status. That on March 28, 1973 in the Supreme Court of the State of New York before the Hon David Epstein, the said Robert Shaban pleaded guilty to burglary at which time the judge directed that he (Shaban) be returned to NACC (Now called DACC) for a determination as to his addiction. On April 2, 1973 Shaban was examined by the commission and found to be a "non-addict". On May 25, 1973, Robert Shaban was declared to be an "non-addict" not-with-standing the prior civil commitment in 1972.

6th. That on or about November 30, 1974, Robert Shaban was detained on a warrant issued by the Drug Abuse Control Commission. That neither your deponent nor Robert Shaban has ever seen or received a copy of the alleged warrant. Pursuant to the authority of the aforesaid warrant, Robert Shaban was incarcerated at the Brooklyn Central Rehabilitation Center.

7th. That your deponent respectfully submits that the confinement of Robert Shaban, or more technically, the revocation of his "after-care" status and imposition of "resident-status" without (1) written notice of the claimed violation; (2) disclosure of evidence against him; (3) opportunity to be heard and present witnesses (4) right to confront and cross-examine witnesses; (5) a neutral and detached hearing body; and (6) a written statement of the fact finder's determination denied to the said Robert Shaban his constitutional rights guaranteed by the 14th

Amendment of the United States Constitution as more particularly described and defined by the United States Supreme Court in *Morrissey v Brewer*, 408 U.S. 471, 92 S Ct 2593. That in *Ball v Jones*, 351 NYS 2d 199, the New York State Appellate Division, Fourth Department, by a unanimous opinion declared that the revocation of "after-care" and the revocation of parole (*Morrissey* case) are in essence identical. The actions of the Narcotics Addiction Control Commission (now DACC) in returning an addict from "after-care" status to "resident status" without the minimum standards of due process as set forth in *Morrissey v Brewer*, supra, is a denial of due process under the 14th amendment of the United States Constitution.

8th. That the relator is not committed or detained by virtue of a judgment, decree, final order, mandate or process except as herein stated.

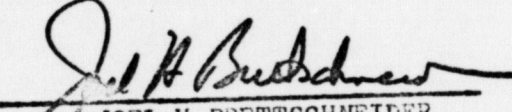
9th. That on the 4th day of December 1974, a writ of habeas corpus was dismissed by the Honorable Oliver D. Williams, Justice of the Supreme Court of the State of New York without a hearing. On the 11th day of December 1974 an order to show cause for an immediate hearing on the appeal and for leave to argue on the original record and documents submitted at the hearing on the writ before Justice Williams was denied. That the appellate courts of the State of New York will be in recess as of Friday, December 13, 1974 and that if the said Robert Shaban could pay for printing of the record on appeal the earliest that the appeal could be perfected would be during February 1975 at which time the said Robert Shaban will have served almost two months of the proposed three month incarceration.

10th. That your deponent has exhausted his remedies available in the State Courts and that any appellate review of the actions of Justice Williams will be moot since the said Robert Shaban will have served all or a substantial portion of the incarceration in violation of his constitutional rights.

11th. That no previous application for the relief sought

for herein, has been made to this Court or any Judge thereof.

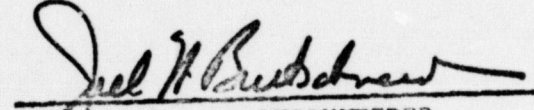
WHEREFORE, petitioner prays that a writ of habeas corpus directed to the STANLEY ESSEN, Director of the Brooklyn Central Rehabilitation Center, 55 Hansen Place, Brooklyn, New York, by whom the relator is detained, issue for the purpose of inquiring into the cause of imprisonment and restraint, and of delivering him therefrom, pursuant to statute in such case made and provided.


JOEL H. BRETTSCHEIDER

STATE OF NEW YORK
COUNTY OF KINGS

JOEL H. BRETTSCHEIDER, being duly sworn, deposes and says:

That he is the attorney for the petitioner above named.
That he has read the foregoing petition and knows the contents thereof. That the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.


JOEL H. BRETTSCHEIDER

Sworn to before me this
day of December 1974

BERNARD FROMARTZ
Notary Public, State of New York
No. 24-10000
Qualified in Kings County
Cert. filed with Kings & Queens Co. Clk.
Commission Expires March 30, 1975

INDEX TO EXHIBITS -

- EXHIBIT 1 - Minutes of plea of ROBERT SHABAN before
Mr Justice Epstein on Indictment # 1054/73
Kings County Supreme Court, dated March 28, 1973
- EXHIBIT 2 - Report of Medical Examination of ROBERT SHABAN
conducted by MACC on "4/2/73" by Dr Rubenstein
which found ROBERT SHABAN to be a non-addict.
- EXHIBIT 3 - Extract of the sentence minutes before Mr Justice
Epstein certifying defendant, ROBERT SHABAN, to be
a non-addict dated May 25, 1973
- EXHIBIT 4 - Extract of the decision of Mr Justice Oliver D
Williams dismissing the writ of habeas corpus
of the relator ROBERT SHABAN
- EXHIBIT 5 - Decision of the Appellate Division, Second
Department, New York State denying the relator's
request for a preference to hear the appeal
before the period of confinement is completed.

(PLEA)

SUPREME COURT OF THE STATE OF NEW YORK

KINGS COUNTY: CRIMINAL TERM: PART IAA

-----x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ROBERT SHABAN,

DEFENDANT.

-----x

Ind. No. 1054/73:

Brooklyn, New York

March 28, 1973

BEFORE:

HON . DAVID EPSTEIN, JUSTICE

APPEARANCES:

LFO SLUTZKY, FSQ.,
ADA
FOR THE PEOPLE

ANTHONY FILIPPO, FSQ.,
LEGAL AID SOCIETY
FOR THE DEFENDANT

EDMUND J. LEHAHAN,

OFFICIAL COURT REPORTER

PLEA

6

THE DEFT: Yes.

THE COURT: You went through
the fire escape, opened the window, and
went into the house?

THE DEFT: Right.

THE COURT: Were you taking
anything from it?

THE DEFT: When I went into
the house, I was trying to get into
6R, but from past experiences I just picked
up a watch off the table.

THE COURT: It was not your
watch?

THE DEFT: No, it wasn't.

THE COURT: Are you an addict?

THE DEFT: No.

THE COURT: You are not a
narcotic addict. So that no examination is
needed.

(Mr. Piliero confers with the defendant
off-the-record.)

PLEA

7

MR. PILIERO: He is certified
as an addict. He is in NACC now.

THE COURT: When were you found
to be an addict, what date?

THE DEFT: July 14.

THE COURT: Of last year?

THE DEFT: '72.

THE COURT: He may not be an
addict now.

MR. PILIERO: It was a civil
commitment, your Honor.

THE COURT: He may not be an
addict now. So do you think an addiction
examination is required?

MR. PILIERO: I don't think it is
necessary, your Honor. He is reporting.

THE COURT: Narcotic examination
in any event. Look, under this clause, you
could be sentenced to a maximum period
of four years in jail. I have spoken to
Mr. Piliero about it.

If you are an addict, I will sentence you

KINGS County

COURT CRIM. JUST. PT. IIA

DOCKET NO.

Date Filed

In the Matter of the Examination of

X

EXAMINING FACILITY

ROBERT F. SHABAN
An Alleged Narcotic Addict

:

BKLYN. CENTRAL REHAB. CENTER

:

55 HANSON PLACE

X

BROOKLYN, NEW YORK 11217

REPORT OF MEDICAL EXAMINATION TO DETERMINE ADDICTION

REPORT OF ADDICTION: Pursuant to the Order of Judge _____
to perform a medical examination to determine addiction, I have personally observed and examined
the above-named narcotic addict on the

_____ day of _____, 19____, at the above-named facility, designated for such
purposes by the Narcotic Addiction Control Commission, and made the attached report. I have also
examined the report of the interviewer,

Mr(s). _____, the Petition or Officer's Report, and/or
appended papers, and as a result of such examination, I declare with a reasonable degree of medical
certainty that

the said _____ is a narcotic addict,
within the meaning of such term, as defined by §201 of the Mental Hygiene Law.

Date _____ Signature _____ M.D.

Type Name _____

REPORT OF NON-ADDICTION: Pursuant to the Order of Judge _____
to perform a medical examination to determine addiction, I have personally observed and examined
the above named alleged narcotic addict on the

2nd day of APRILX, 1973, at the above-named facility, designated for such
purpose by the Narcotic Addiction Control Commission, and made the attached report. I have also
examined the report of the interviewer,

Mr(s). J. RHEM, the Petition or Officer's Report, and/or
appended papers, and as a result of such examination, I find insufficient evidence upon which to declare
that the

said ROBERT SHABAN is a narcotic
addict, within the meaning of such term, as defined by §201 of the Mental Hygiene Law.

Date 2d 4/2/73 Signature _____ M.D.

Type Name C. S. RUBENSTEIN, M. D.

DISTRIBUTION

Original White Copy to Court (Section 208, 209), or County Clerk (Section 206, 210)
Second White Copy to NACC with order of Certification (to accompany Certified Addict)
Green Copy to District Attorney (Section 208, 209, 210) or Attorney General (Section 206)
Pink Copy to Alleged Addict
Blue Copy to NACC Bureau of Management Information Services and Statistics, Executive Park, P.O. Box 9203
Albany, New York 12203
Yellow Copy to Examining Facility

NACC C-6 (3/72)

Sent.

3-19

SUPREME COURT : KINGS COUNTY

CRIMINAL TERM : PART IAA

-----X

THE PEOPLE OF THE STATE OF NEW YORK

against

ROBERT SHABAN,

Defendant

-----X

(Ind. 1054/73)

Brooklyn, N. Y.

5/25/73

Before:

Hon. David Epstein,
Justice

Appearances:

J. Silverman, Esq., LA
For the Defendant

Sanford Aronow, CSR
Official Reporter

Sentence

THE CLERK: Your name is Robert Shaban?

THE DEFENDANT: Yes, sir.

THE CLERK: On April 2, 1973, a Dr. Rubenstein, of the Narcotic Addiction Control Commission, examined you and found you a non-addict. Do you object to the finding?

THE DEFENDANT: No.

THE CLERK: You may speak; your attorney may speak; the District Attorney may speak. Do you want to address the Court with reference to your sentence or would you like your attorney to speak for you?

THE DEFENDANT: My attorney.

MR. SILVERMAN: Your Honor, I understand certain statements were made by the Court at the time the plea was taken. I'll rest on those statements.

THE COURT: That's right. I said I would give him a five year probation or a year in jail, at my discretion.

MR. SILVERMAN: My conversation --

THE COURT: Isn't that right, Mr. Shaban?

THE DEFENDANT: Yes, sir.

MR. SILVERMAN: Your Honor, may I have a moment to confer with my client?

(Mr. Silverman conferred with the defendant.)

satisfied that he is entirely drug-free. Not that I think so, not because you think so, because he says he has received no drugs in the meantime. That is all you're going by.

MR. BREITSNEIDER: No, Judge, I submit that there is no record with the Drug Abuse Commission now that they had treated him at all. Other than the act of going and reporting once a week.

THE COURT: More than that.

MR. BREITSNEIDER: Judge, there was nothing more than that. He did not receive --

THE COURT: Why does he go back? He has his urine tested probably, may have a blood test or whatever they had, I don't know, I am not a doctor but they don't just want to look at him and see him go out.

MR. BREITSNEIDER: They have him back there for three more months, that's the information I have.

THE COURT: I'm afraid I will have to deny the writ.

MR. BREITSNEIDER: Would your Honor issue a decision on this? I would like to take an appeal on it.

MR. STICHINSKY: We would ask that he be remanded back to the Drug Abuse Control Commission.

THE COURT: It appears that this defendant was

certified to the Drug Abuse Control Commission or to the Narcotics Addiction Control Commission as the facility was then called in 1972 as a drug addict. He was treated for a period of months and then he was allowed to receive treatment or report on an out-patient basis. He was directed to report to the facility and that he did so up to a certain period and then for reasons best known to himself, fear or what-not, he failed to appear. A warrant was issued for his failure to appear and he is now being held in the Men's House of Detention. In custody for the Narcotics Addition Control Commission or the Drug Abuse Control Commission. It appears that he was, that subsequent to that certification, he was indicted under Indictment No. 1054 of '73 charged with burglary in the third degree, petit larceny, that under that indictment and in order to determine what sentence should be imposed upon the defendant, after he took a plea before Mr. Justice Epstein, on March 28, 1973, it was ordered that he should be examined to determine whether he was drug dependent. That on April 2, 1973, Dr. Rubenstein examined the defendant and found that he, that there was insufficient evidence upon which to declare Robert Shaban a narcotic addict. It is

now the contention of the defendant that in light of these circumstances he should be discharged and the certification of addiction made in 1972 should be vacated and the defendant now to go entirely free except for the fact that he, I suppose, could be sentenced by Judge Epstein as a non-addict.

MR. BREITSNEIDER: I am not sure what you said.

THE COURT: Do you contend that he cannot even be sentenced by Judge Epstein now?

MR. BREITSNEIDER: He was already sentenced by Judge Epstein as a non-addict.

THE COURT: He was sentenced.

MR. BREITSNEIDER: After a finding he was sentenced as a non-addict to five years' probation.

THE COURT: The cover of the file doesn't show that. We will add that he was sentenced as a non-addict.

MR. BREITSNEIDER: It was a finding of the Court that the report of Dr. Rubenstein was submitted to the Court at which time Judge Epstein found him to be a non-addict and sentenced him as a non-addict to five years' probation and I submit that that finding of the Supreme Court vacated the previous finding of a judge for a certification of necessity.

It must.

THE COURT: That is your position. Now the question. I don't think that that necessarily follows, that you may take such proceedings as you may think is necessary or required to have the certification of 1972. That's what you're referring to, vacated. But I don't think it's within the jurisdiction of this Court at this time under this writ to vacate that certification. And that is without prejudice to your doing anything that you may be so advised to have it vacated.

MR. BREITSNEIDER: Obviously, Judge, it has to go before your Honor again. That is the purpose. It seems an exercise in futility if this is your decision to bring the same action back before your Honor because you are going to recall on the same facts and circumstances here as setting aside the determination.

THE COURT: We might hear some further -- this is all on the record. You have no objection to his being examined now and another doctor comes in and finds he is drug addicted. What are they going to do then? You want us to do that? I mean just because this situation developed as it has doesn't necessarily

follow that once the Drug Abuse Control Commission has an opportunity to come in and present its side and gives its reasons for wishing to have him continued under the certification of 72, that the Court will necessarily say that it has no right to do it.

MR. BREITSNEIDER: There is no evidence or nothing brought into this court at all, your Honor, and I realize that the burden is on myself as being the writ but nothing is brought in here as to any reason for a warrant being lodged in view of all these facts which should be known to the DACC Commission except solely for it and I repeat it again. It is solely for the purpose of punishing this defendant for failing to show up. They haven't said anything about him being an addict. There is nothing that he has violated other than the fact that I told the Court that he didn't report and for that he is being sent back to the institution although he has been found to be a non-addict by the Supreme Court Judge of this court based on an examination at the facility owned, operated and run by NACC, DACC, or whatever the name is now and that finding by the Supreme Court and that decision by a Supreme Court of which is a record of this court in this proceeding or in

are going to, irrespective whether they find him to be an addict since he didn't report going back, under the circumstances I can't consider anything other than the fact itself, now punishment. Nothing more than punishment. For fourteen or fifteen months he was out doing the same thing he did every week without being treated, and to send him back can be no other conclusion than that it has been punishment and nothing more. No matter what that court and any other people say the answer is it is punishment although this Court is taking the view this is for correction while in eighteen months they didn't correct him, he corrected himself and the fact going down there once a week and having your urine tested is not treatment and they didn't find anything and haven't found any evidence that they found anything or using drugs but they are going to put him away for three months, anyway.

MR. STICHINSKY: I would just like to state that the Attorney General's Office represented the Drug Abuse Control Commission and did represent the Narcotic Addiction Control Commission. I take exception to the language being alleged today about a travesty of justice. The position we take is that

this county, of Judge Epstein, finding him for a non-addict and to send him back for incarceration based on the evidence I have here is a travesty of justice.

THE COURT: You use very harsh terms which the law does not recognize as the purpose of the Drug Abuse Control Commission. Incarceration, punishment, and that is not the purpose. They are asking that he be brought back for further treatment.

MR. BREITSNEIDER: May the record indicate that I have spoken to the Commission and I was advised that they are sending him back to Arthur Kill for three months. Now this three months, whether the Court will realize it or not, this defendant has five years at probation and this may be a violation of his probation. His rights have been violated throughout this entire proceeding by the People of the State of New York, most obscene in the criminal courts and the police stations with respect to some of the arrests or how this came about or arrests in this matter. Thank God in justice.

THE COURT: Submit it to the court, then.

MR. BREITSNEIDER: But to send him back for three months because that is where they indicate they

the Drug Abuse Control Commission still has jurisdiction in this matter and this is why the respondent must be remanded to the Drug Abuse Control Commission and I take exception to the language by Mr. Breitsneider and travesty of justice, etc.

THE COURT: All right, the writ is dismissed. Defendant remanded to the custody of the Drug Abuse Control Commission.

MR. BREITSNEIDER: In view of the fact that it would be impossible to get an appeal in this matter before three weeks, may I request that the learned counsel for the Attorney General's Office will stipulate to an agreed set of facts at least as to that we can present it to the appellate division.

THE COURT: I think on a writ of habeas corpus forthwith, if possible. You might call whoever you're accountable to, this is an appeal to be taken or decision on writ of habeas corpus and it is requested that the minutes be prepared.

MR. BREITSNEIDER: Your Honor has ruled on one aspect, this matter, but the defendant is presently being incarcerated in a criminal jail. Under any circumstances since there are no criminal charges pending against him he should not be incarcerated in

that facility. He has to be incarcerated now for three days. All criminal charges against him have been dismissed and I submit that this Court should order or direct that he be released from it or transferred to some other institution other than the penal institution immediately.

THE COURT: Yes, he should be held in civil custody, not in criminal custody.

MR. STICHINSKY: We are requesting that he be remanded to the Drug Abuse Control Commission.

THE COURT: To the Drug Abuse Control Commission which is a civil facility.

* * *

No. 4621

The People, etc., ex rel. Joel H. Brettschneider, attorney, on behalf of Robert Shaban, appellant, v. Theodore West, Warden, Brooklyn House of Detention for Men, et al., respondents.

Motion by appellant for a preference in the hearing of his appeal from a judgment of the Supreme Court, Kings County, dated December 4, 1974 and to have said appeal heard on the original papers, submitted on the motion, in the Supreme Court, at Special Term.

Motion denied. On the court's own motion, the appeal will be heard on the original papers and on the typewritten briefs of the respective parties, who are directed to file eight copies of their respective briefs and to serve one copy on each other.

HOPKINS, Acting P.J., MARTUSCELLO, SHAPIRO and COHALAN, JJ.,
concur.

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
-----X

3 THE UNITED STATES OF AMERICA :
4 ex rel ROBERT SHADAN :

5 Petitioner :

6 -against- :

7 STANLEY ESSLER, etc. :

8 Respondents
-----X

9 225 Cadman Plaza, E.
10 Brooklyn, N.Y.

11 A hearing was held on December 20, 1974
12 beginning at 10:15 a.m.

13 Before: HON. THOMAS C. PLATT
14 District Court Judge

15 Appearances:

16 BRETT SCHNEIDER, Esq.
17 26 Court Street
18 Brooklyn, N.Y.
19 Attorney for Petitioner

20 LOUIS LEFKOWITZ, Attorney General, N.Y.S.
21 2 World Trade Center
22 New York, N.Y.

23 Representing Respondents

24 By: BURTON HERMAN, Asst. Attorney General
25 JEFFREY STICHINSKY, Asst. Attorney General
Of Counsel

Joseph L. Benedetto
Acting Court Reporter

Joseph L. Benedetto, Stenotype Reporter, 39 Adams Street E., East Islip, N.Y. -- 581-3052

1
2 MR. SCHNEIDER: Under the circumstances,
3 I don't think, at this time, it is necessary.

4 THE COURT: Do you want a hearing?

5 MR. SCHNEIDER: Is your Honor going to hold
6 a hearing today?

7 THE COURT: I'll hold a hearing Tuesday
8 morning.

9 MR. SCHNEIDER: I would like the defendant
10 released prior to that.

11 THE COURT: I'll give you a hearing Tuesday
12 morning to find the underlying facts as to why the
13 revocation occurred, what was done to him and so on
14 and if you think it will aid your case, I will give
15 you a hearing.

16 MR. SCHNEIDER: I don't think it will ma-
17 terially aid the judge because the deprivation of
18 his constitutional rights under the 14th Amendment
19 clearly have been violated.

20 THE COURT: You keep asking me why is he
21 the way he is and I can't compel these gentlemen to
22 produce the people. They are attorneys.

23 Do you want Tuesday morning?

24 MR. SCHNEIDER: Fine.

25 THE COURT: Have the ones responsible for

1
2 the various decision-making policies present here
3 to explain why he's incarcerated.

4 MR. HERMAN: Your Honor, suppose we had
5 a hearing on these matters, I don't see where the
6 Federal issues are involved as to the reasons why
7 he was brought back.

8 THE COURT: Wait a minute. You incarcerated
9 somebody, you deprived them of their life and liberty.
10 Certainly their liberty, if there's no basis for it,
11 he certainly has a constitutional claim.

12 MR. HERMAN: There's a question of State
13 law as to whether he's a drug addict.

14 THE COURT: Maybe everything I've heard
15 on this bench has been wrong but this is probably one
16 of the most significant constitutional questions
17 you can get, deprivation of life and liberty being
18 guaranteed by the constitution.

19 If he's being deprived of it under some
20 State law, that is unconstitutional. He's entitled
21 to a hearing on that and have the whole law set
22 aside, if necessary.

23 MR. HERMAN: Would the hearing go into
24 whether this State law is unconstitutional?

25 THE COURT: It may. He wants to know the

1
2 reasons for the revocation of his status. Mr. Shaban
3 has not been give a hearing and he's been transferred
4 from one facility to another the way I understand
5 it.

6 Suppose a United States Marshal walked
7 into the courtroom and said, "That's your man" and
8 the next thing you knew is you found yourself at
9 West Street and you came back and said you want a
10 hearing and I said, "No, that's a matter of State
11 law," you'd be very unhappy, wouldn't you?

12 That's what happened to this man. He
13 has not been given any reasons.

14 MR. HERMAN: We agree but -

15 THE COURT: They used to do that in Germany
16 a few years ago and that whole system was discredited.

17 MR. HERMAN: Excuse me, your Honor. May
18 I just question the determination here this morning?
19 This hearing, which is being ordered by his Honor,
20 presently is a hearing on the writ itself? This is
21 not a hearing pursuant to the Ball case?

22 THE COURT: No. It's a habeas corpus
23 hearing.

24 MR. HERMAN: On the writ?

25 MR. SCHNEIDER: Yes.

Judge, may I say it still doesn't say the

defendant wouldn't be entitled to the writ anyway.

THE COURT: You say you want a hearing on the habeas corpus writ and you're entitled to it.

In fact, if they had their witnesses, I would order a hearing right now.

MR. SCHNEIDER: My anxiety is over the proximity of Christmas.

THE COURT: The best I can do is I will set it down for Tuesday. I'd set it down for Monday but I have another trial on.

MR. SCHNEIDER: No, Tuesday will be fine.

THE COURT: If there's no basis for him being held on Tuesday, maybe, perhaps, I will order him not held.

MR. SCHNEIDER: Can I have him ordered to be produced?

THE COURT: Yes.

I suggest you go across the street. I'm not going to direct you to go across the street but I suggest you go across the street.

MR. HERMAN: I think we've discussed that before, your Honor.

THE COURT: You're not going to go? If

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4 -----X

5 SHABAN :

6 Plaintiff :

7 against :

74 @ 176

8 ESSEN :

9 Defendant :

10 -----X

11
12 United States Courthouse
13 Brooklyn, New York

14 December 24, 1974
15 10:00 a.m.

16 B e f o r e

17 HONORABLE THOMAS C. PLATT

18 U. S. D. J.
19
20
21
22
23

24 SHELDON SILVERMAN
25 Acting Official Court Reporter

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Appearances:

JOEL H. BRETTSCHEIDER, Esq.
Attorney for Plaintiff

LOUIS J. LEFKOWITZ, Esq.
New York State Attorney General

By: JEFFREY STICHINSKY, Esq.
Assistant Attorney General
and
BURTON HERMAN, Esq.
Assistant Attorney General

1 THE COURT: Yes, of course.

2 MR. HERMAN: This is Mr. Sullivan, the drug
3 after-care officer. He has all the information con-
4 cerning your Honor's questions.

5 MR. JOHN L. SULLIVAN: I'm a drug after-care
6 officer at Brooklyn Central Rehabilitation Center,
7 55 Hanson Place.

8 THE COURT: Why don't we put him on the
9 witness stand, and you ask him any questions.

10 MR. HERMAN: Very well, your Honor.

11
12 J O H N L. S U L L I V A N, having been duly
13 sworn by the Clerk of the Court, testified as follows:

14 THE CLERK: State your name for the record.

15 THE WITNESS: My name is John L. Sullivan.

16 I'm a drug after-care officer.

17 DIRECT EXAMINATION

18 BY MR. HERMAN:

19 Q Mr. Sullivan, on what date was Mr. Shaban
20 declared delinquent on his after-care status?

21 A Mr. Shaban was declared delinquent on 9/6/74.

22 Q What was the reason for his being declared
23 delinquent on that date?

24 A The reason, he lost contact of the agent.
25 He had not reported in a substantial period of time.

1
2 Q What was the substantial period of time
3 that he had not reported?

4 MR. BRETTSCHEIDER: Of course I'm going to
5 object to the term "substantial."

6 MR. HERMAN: A period of time.

7 THE COURT: He said substantial period.
8 If it's two days -- we'll see.

9 A His last report to after-care was July 30th
10 of 1974.

11 Q And what date was he taken into custody?

12 A I believe he was brought in 12/6/ of '74.

13 Q Into the narcotics facility?

14 A And as a result of the detainer warrant.
15 I didn't have a part of that. He was brought in by the
16 warrant squad.

17 THE COURT: When did you issue the warrant?

18 THE WITNESS: A warrant was issued at the
19 time he was declared L.T.C., 9/6/74, to our warrant
20 squad. A detainer warrant was subsequently placed
21 when he was --

22 THE COURT: When was that?

23 THE WITNESS: That was placed by residence
24 movement, not by me. The detainer was placed when
25 he was in police custody. There are two different

1
2 types --

3 THE COURT Sometime in November or early
4 December?

5 THE WITNESS: There are two different types
6 of warrant.

7 THE COURT: Do you know when it was done?

8 THE WITNESS: I don't know the exact date.

9 Q Upon his -- Prior to the actual issuance
10 of the warrant, had the narcotics facility -- Withdrawn.

11 Had the narcotics facility tried to contact
12 Mr. Shaban at his home address?

13 A Yes. I visited the house, Mr. Shaban's house,
14 and talked to his father, and in several instances, and
15 I made at least five or six phone calls to his folks in
16 order to try to determine his whereabouts.

17 Q What was the result of those inquiries?

18 A His parents indicated they didn't know his
19 whereabouts and they had no idea where he was.

20 Q What was the basis for issuing the warrant?
21 Could you explain what the basis for issuing the warrant
22 was?

23 A I supervised Mr. Shaban from August of '73
24 until the time that I declared him lost to contact. When
25 I first assumed the case, Mr. Shaban was working and he was

1
2 going to school and he was making an excellent adjustment.
3 That adjustment began to deteriorate. He subsequently
4 dropped out of college. He caused himself to be fired from
5 his job by excessive absenteeism.

6 In the beginning, when he was doing well,
7 he reported to me once a month, and when he lost his job,
8 dropped out of school, and his plan for the summer was
9 to collect unemployment and to go to the beach, I placed
10 him on weekly reporting. That was on June 11th of 1974.

11 For several weeks he came in and reported and
12 then he just stopped reporting and stopped coming in after
13 the 30th of July.

14 Q Now, upon his return to the facility, the
15 decision was made to hold him in the facility. Was the
16 decision made to hold him in the facility on in-patient --
17 in-patient; was there a decision made?

18 A That decision was made to hold him for an
19 indefinite period in a residential status.

20 Q Do your records indicate what the basis of
21 that decision was?

22 A The report was prepared by my supervisor and
23 it indicates, "Now, after discussion with Mr. Shaban and
24 due to his reporting record and his adjustment, the de-
25 cision was an indefinite return to after-care, to residential"

1
2 status.

3 THE COURT: Was any hearing held in connec-
4 tion with that prior to the determination?

5 THE WITNESS: There's -- you know, there's
6 no process built in for legal hearing on that.
7 That's a decision of the after-care officer and the
8 supervisor and the hierarchy of the commission.

9 THE COURT: Was any notice given to Mr.
10 Shaban or his attorney prior to that decision, formal
11 written notice?

12 THE WITNESS: I don't believe so. Not by me,
13 anyway. I'm not aware of it ever being done.

14 THE COURT: Was any notice of the determina-
15 tion, written notice of the determination with all
16 the reasons therefor, formally given to Mr. Shaban
17 or his attorney?

18 THE WITNESS: I don't believe so, not to my
19 knowledge.

20 Q When he was originally released on after-care
21 status, did he sign something?

22 A Yes, he was given a list of the rules of after-
23 care and the regulations that he was supposed to obey.
24 He signed that and a copy should be on file in his folder
25 in the commission.

1
2 MR. BRETTSCHEIDER: Might I ask he produce
3 that copy. I would like to see it.

4 Q Would you be able to find that here some-
5 wheres?

6 (Documents handed to the witness)

7 A I might be able to.

8 THE COURT: While you're looking for that,
9 let me ask you a question.

10 Do you know what he was being held in the
11 Kings County Jail for?

12 THE WITNESS: No, I don't know anything about
13 the details of his arrest.

14 THE COURT: You don't know anything about
15 that?

16 THE WITNESS: No. Let me add I was trans-
17 ferred effective November 20th off the case load,
18 and you know, from that date on, I have not parti-
19 cipated in any decisions that were made.

20 (Pause)

21 THE WITNESS: This is at least one that he
22 signed.

23 THE COURT: Show it to Mr. Herman and Mr.
24 Brettschneider.

25 THE WITNESS: There may be others in the

record, too. The form essentially is the same form.

Q Now, does that form which he signed, does that indicate on the form, does it indicate anything concerning reporting to after-care centers?

A Yes, the form does indicate, "You must also agree to do the following: Report to your after-care officer as directed."

Q Now, did Mr. Shaban get in touch with you through phone or by mail or through any other medium concerning his inability to report to you?

A No, he didn't.

MR. HERMAN: That's all the questions I have, your Honor.

THE COURT: Any cross?

CROSS EXAMINATION

BY MR. BRETTSCHEIDER:

Q Mr. Sullivan, you released -- the defendant was released from Arthur Kill facility in December of 1972; is that correct?

A 12/11/72 I have on my card that he was released from Arthur Kill.

Q During that time he has not been on any drugs, either synthetic or as far as any treatment is concerned by you people; is that correct?

1
2 A The records I'm directly familiar with,
3 my area of supervision, from August of '73 until the pres-
4 ent, during that time I don't see any positive urine
5 specimens nor drug abuse.

6 Q So that the entire time he's on after-care
7 he was not on methadone; is that correct?

8 A As far as I know, that's correct.

9 Q And that you tested his urine for this entire
10 year and a half or whatever time he was there, always
11 found negative; is that correct?

12 A That's correct.

13 Q Sir, are you aware that in April of 1973,
14 Dr. Rubenstein certified this defendant to be a non-addict?

15 A I wasn't aware of that. I'm aware of an arrest
16 on 2/15 --

17 MR. STICHINSKY: We object on the ground
18 it has nothing to do with this proceeding.

19 THE COURT: Overruled.

20 Q I show you a document.

21 MR. BRETTSCHEIDER: Might we refer to
22 Exhibit 2 of the defendant's petition?

23 THE COURT: If you wish.

24 Q What is that document, sir?

25 A This is a report of medical examination to

1
2 THE WITNESS: That's the ones I have listed
3 here. I have a day book that I keep my activity.
4 That's the ones I list on the card. On the day
5 sheets, if you want to get his parent, they can
6 tell you when I visited his house or I can tell
7 you if I look at my day books. I did make visits
8 and phone calls.

9 I can get them if I pull my day sheets out
10 to look at them.

11 Q Now, after he didn't report, and he failed
12 to report, in August, you were aware, sir, that the police
13 were looking for him for nine armed robberies?

14 A I was not aware of that.

15 Q I see. Are you also aware the police had
16 refused to give the defendant a lineup during that period?

17 A I'm not aware --

18 MR. STICHINSKY: Objection. There's no con-
19 nection here.

20 THE COURT: Wait a minute. He can ask the
21 questions. If he's not aware, he's not aware.

22 Q Are you aware, sir, I surrendered the defend-
23 ant to the Police Department on November 30th?

24 A No, I'm not aware.

25 Q Are you aware that the Police Department re-

1
2 fused to put the twin brother in a lineup claiming two
3 people who looked alike could not be in a lineup.

4 A I'm not aware of that.

5 Q Are you aware that the police threatened to
6 lock him up for nine robberies and throw the key away?

7 A No, I'm not aware.

8 Q Did you make any effort to find out why he
9 was not showing up?

10 A Certainly. I visited his family, his house,
11 on at least two occasions and made five or six phone calls.

12 Q Now, sir, when or who was the person or what
13 part of your organization was the one that issued the
14 violation of probation or violation of after-care status?

15 A I declared him lost to contact on September
16 6th, of 1974. I declared him lost to contact from the
17 agency and I wrote the delinquency report and chronological
18 summary of his progress to that date.

19 Q Your basis of declaring him delinquent was
20 solely on the basis he did not report?

21 A And the deteriorating pattern of function.

22 Q What exactly deteriorating pattern?

23 A The loss of school, loss of job, collection
24 of unemployment, the statement that, "I want to go to the
25 beach over the summer, just hang around and do nothing."

1
2 Q Mr. Shaban was certified to the Commission; on
3 what date was he certified?

4 A 7/14/72.

5 Q Has the Commission since that date discharged
6 him as being rehabilitated?

7 A No, we have not.

8 Q For what period of time was he certified to
9 the Commission?

10 A He was certified for a three-year period.
11 He's due, expiration was due to expire 7/13/75.

12 Q Do you know when it's due to expire at this
13 time?

14 A He has some bad time from 9/6 until he came
15 back to the commission. Those days that he was not report-
16 ing, he was lost to the contact status at that time.
17 I would have to sit with a calendar and count them out.
18 That's Albany's function, not mine.

19 RECROSS EXAMINATION

20 BY MR. BRETTSCHEIDER:

21 Q Mr. Sullivan, what is the effect of an
22 examination by your doctors to determine him to be a non-
23 addict?

24 A The effect?

25 Q Yes.

1
2 THE COURT: They did ask you. You were
3 asked because of some nervous state he had.

4 THE WITNESS: Right.

5 Q Would you repeat the date that you saw him
6 again?

7 A 18th of December.

8 Q December 18th.

9 Now, on that date, when you examined him,
10 did Mr. Shaban indicate to you during the course of the
11 conversation, did he make any statements which you can re-
12 call which bore on the question as to whether he is a drug-
13 dependent person?

14 A Well, of course, it was because --

15 Q Did he make such statements?

16 A He made the statement that he's a drug
17 addict, yes.

18 Q What exactly were those statements that he
19 made?

20 A The statement says that he was using heroin for
21 seven years, in the past.

22 THE COURT: In the past?

23 THE WITNESS: Yes.

24 Q Were there any other statements that he made
25 in connection with this subject?

Krausz-direct

1
2 A Yes, he was using other drugs as well. Do
3 I have to tell you which ones?

4 Q What other drugs did he mention?

5 THE COURT: Doctor, before you read them,
6 did he give you a date as to when he was using these
7 drugs?

8 THE WITNESS: No.

9 THE COURT: Did you ask?

10 THE WITNESS: No, it was just for my general
11 information. I usually ask -- I tell you why.

12 THE COURT: You don't have to give me a
13 speech.

14 THE WITNESS: I didn't ask.

15 THE COURT: You don't know when the past was?

16 THE WITNESS: No.

17 Q What drugs did he say he was using for seven
18 years?

19 A Heroin.

20 Q Did he mention any other drugs that he was
21 using at any time?

22 A Yes.

23 THE COURT: How old is this individual,
24 Doctor?

25 THE WITNESS: Twenty two. Amphetamines, LSD,

hallucinogens and belladonna.

Q Was it his statement he was using heroin for seven years?

A Yes.

Q He's a twenty-two year old individual?

A Yes.

Q Now, based on your conversation with Mr. Shaban, did you form any conclusion as to whether Mr. Shaban is a drug dependent-person?

MR. BRETTSCHEIDER: Objection, if the Court please. I don't think there's such evidence to establish that at this time.

THE COURT: I don't think so either, but I'll take it for such weight as it may have.

A Well, --

Q Could you answer the question, on the basis of your conversations with Mr. Shaban on that date? Did you form any conclusion as to whether Mr. Shaban is a drug-dependent person?

A Yes, I did.

Q You did form a conclusion?

A Yes.

Q Did you form this conclusion with a reasonable degree of medical certainty?

1
2 A Only according to his statements.

3 Q Was your conclusion based on his statements
4 a conclusion or an opinion of yours which you could express
5 to this Court with a reasonable degree of medical certainty?

6 A Well, not whatsoever only at that time, on
7 the basis, his statement.

8 Q On his statement?

9 A His statement.

10 Q On the basis of his statement, do you have an
11 opinion whether he is a drug dependent person?

12 A Yes.

13 Q What is your opinion and your conclusion?

14 A He is.

15 Q That he's a drug-dependent person?

16 A Right.

17 MR. HERMAN: All right.

18 CROSS EXAMINATION

19 BY MR. BRETTSCHEIDER:

20 Q Doctor, are you aware in 1973 that Dr. Ruben-
21 stein -- Withdrawn.

22 Do you know Dr. Rubenstein?

23 A No.

24 Q Sir, you have a document in front of you.
25 Is that a form executed by the New York State , then

1 which he was arrested and then later the charges
2 were dismissed, I take it he's still on parole from
3 his prior violation, but that parole hasn't been
4 revoked.

5 MR. BRETTSCHEIDER: We have notified the
6 Probation Department that I was returning him to
7 the Police Department. I brought him into the
8 police station. We notified Probation. I did
9 not notify them until after I found out about the
10 warrant. We had two weeks of negotiations with the
11 Police Department, basically my requesting a lineup
12 and I wanted it done so the Wade hearings would be
13 conducted.

14 THE COURT: In any event, parole wasn't
15 revoked.

16 MR. BRETTSCHEIDER: Never revoked. We have
17 notified Judge Epstein as to the aspects of this
18 matter and no probation has been revoked, although
19 I have to notify his probation officer that he could
20 not appear before her because the DACC had him.

21 If this writ were to be granted, in your
22 judgment would he return to the after-care status
23 that he was in prior to the imposition of the
24 resident status?

25 MR. BRETTSCHEIDER: Judge, I would not have

1 any objections to it now, but I may state to the
2 Court parenthetically, after talking to him, that
3 his sole function in eight months has been coming
4 in once a month, having his urine tested, and
5 leaving.

6 I also submit, Judge, that I'm a little
7 concerned of the effect of the non-addiction certi-
8 fication by the Commission to Justice Epstein, as
9 to whether that terminated the drug abuse, because--

10 THE COURT: It may or may not. The problem
11 that I have is this, is really, at that point, all
12 I'm asked to determine is whether he should be
13 continued in custody, and I'm not really in a
14 position to make a determination as to whether or
15 not all of the procedures prescribed by the State
16 Mental Hygiene Law, rules and regulations pre-
17 scribed thereunder by DACC are constitutional or not.

18 I'm really addressing myself to this
19 particular case. It's sort of like seeking a
20 temporary restraining order, which puts everybody
21 in status quo, where he was before the complained-
22 of act occurred, and in that sense that's the
23 reason for my question, to return people to the
24 status quo would be to return them to after-care
25 status, but not to pull him out to the point where

1 he might or might not be able to achieve some other
2 status if he were in after-care and then went to
3 the State Court and achieved the determination that
4 he was no longer drug-dependent.

5 MR. BRETTSCHEIDER: My thrust at this time,
6 and I appreciate that Your Honor may release him --
7 I'm only concerned that he be released from what
8 I call confined now at the Arthur Kill facility.

9 And the thrust of my argument -- I would
10 submit that apropos this particular case that it
11 must be a finding of the court, and I think once
12 again -- I assume something perhaps I shouldn't --
13 but that the law and the application of it is
14 unconstitutional now.

15 There's no reason to believe these people --

16 THE COURT: Wait, Mr. Brettschneider.

17 I understand your challenge to the law of
18 that portion of Section 81.30 which you challenge
19 in this particular application, but that doesn't
20 call on me to determine that the entire Mental
21 Hygiene Laws are unconstitutional.

22 MR. BRETTSCHEIDER: That one point.

23 THE COURT: That has nothing to do -- that
24 only pertains to the summary revocation and some
25 reimposition of the resident status.

1 MR. BRETTSCHEIDER: That's correct.

2 THE COURT: That's solely -- that's all that
3 pertains to.

4 MR. BRETTSCHEIDER: If your Honor were to
5 be so inclined as to discharge him or grant the writ,
6 of course with the same procedures of picking him
7 up and putting him back in --

8 THE COURT: They couldn't use the same
9 procedures. They would have to presumably be con-
10 stitutional.

11 Assuming I went along with your theory,
12 that's the reason I'm asking you, then you would
13 have an opportunity, if they were to follow the
14 proper procedures, you would have an opportunity to
15 present your side of the case as to the effect that
16 Dr. Rubenstein's certifications have in 1973 at
17 any such hearing -- then presumably you have an
18 Article 78 proceeding from that to the Supreme Court
19 if you didn't obtain your relief at that hearing.

20 MR. BRETTSCHEIDER: My position at this time--
21 and I think it's well taken -- is that if the Court
22 were to grant it-- and I don't believe that there's
23 any question either on my part -- I'm assuming also
24 on the appeal, that it must be he's entitled to a
25 hearing, since the law does not provide for a hearing

1 or that portion of it, 81.30, what assurances do
2 I have that even if your Honor were to grant the
3 writ here they would not incarcerate him again
4 and move him in?

5 Apropos the granting of the writ, there must
6 be some finding of the court that that portion of
7 it is unconstitutional because it's been --

8 THE COURT: I'm not arguing that point.

9 MR. BRETTSTEIN: You can put him in after-
10 care.

11 THE COURT: I'm not prepared to say that --
12 assuming I went along with your motion, I'm not
13 prepared to say that DAK couldn't enact rules and
14 regulations to promulgate them in accordance with
15 whatever procedures are prescribed.

16 I assume there's got to be some notice and
17 so forth as there is for the promulgation of regu-
18 lations which set up hearings, preliminary hearing
19 and final hearing, we'll say, and gave you your
20 opportunity before a remand, so to speak, to pre-
21 sent Dr. Rubenstein's report and whatever other
22 evidence you had before putting him back into
23 custody.

24 MR. BRETTSCHEIDER: I believe if a writ
25 were to be granted by your Honor, the only effect

1 of the writ would be to release him from the
2 Arthur Kill facility, and whatever law is still
3 applicable to him would be applicable, would remain
4 in effect.

5 THE COURT: Would remain in effect. I think
6 that's probably the net effect of what would happen.

7 MR. BRETTSCHEIDER: But, as I say --

8 THE COURT: How do you see it? That he
9 would return to after-care status?

10 MR. HERMAN: That would depend upon the
11 nature of the order, Judge, or the nature of your
12 decision.

13 THE COURT: Assume I declared Section 81.30
14 unconstitutional in the respect that it fails to pro-
15 vide for a hearing and notice and prior to a remand
16 or revocation and imposition, then the question
17 I ask, the new question that's bothering me is
18 where does he go? Back to after-care status, or
19 does he go out beyond the jurisdiction of the DAC?

20 MR. HERMAN: I couldn't answer that question.

21 MR. STICHINSKY: Is this court, your Honor,
22 going to follow the Ball case and --

23 THE COURT: I'm searching to find out if you
24 are in agreement as to where he would go if the
25 court were to follow the Ball case.

1 MR. STICHINSKY: Your Honor, I don't
2 know whether that's a -- whether that's an issue
3 which we would be able to express an opinion on
4 at this point. I don't know, really.

5 THE COURT: Mr. Brettschneider agrees that
6 maybe that's the status he would go into. I'm not
7 sure whether I get a commitment from him or not.

8 MR. BRETTSCHEIDER: The release of the
9 respondent would put him in after-care because
10 I don't have a Supreme Court order. You're changing--
11 as your Honor indicated, a release of a person, be
12 it either criminal or civil or quasi criminal, just
13 releases the man from the institution, the same
14 as bail bond. It doesn't mean the case is dismissed
15 or anything else, so that all you're doing is re-
16 storing --

17 THE COURT: That's the way I see it.

18 MR. BRETTSCHEIDER: You're restoring the
19 status quo. Apropos reporting the status quo,
20 incumbent on the state court in this matter, there
21 must be a finding that this cannot be permitted
22 because as soon as you put him back in the status
23 quo --

24 THE COURT: They would be for all practical
25 purposes flouting the order of the court if they

1 picked him up as he walked out the door, without
2 a hearing to put him back in. They would have to
3 comply with what the provisions are.

4 MR. BRETTSCHEIDER: Apropos the court order
5 that section must find the Commission may place a
6 person from after-care to in-resident status is
7 unconstitutional where it does not provide for it.
8 Unless this court does, the Legislature will do
9 nothing and this defendant petitioner, whether he
10 be here now, will walk out on the street, and if he
11 doesn't show up by seven o'clock one night they
12 may declare him to be in violation again.

13 The purpose is that not only to be released
14 now but as well as he is, hundreds of thousands of
15 others are entitled to the same privilege of
16 constitutional due process. That's the thing that
17 disturbs me more than this particular case.

18 THE COURT: I'm prepared to give you a
19 decision. I think we're essentially in agreement
20 as to what ought to be done, to happen. That is
21 based on the decision.

22 I think this record that was made here today
23 reinforces my conviction that the Appellate
24 Division, Fourth Department, and the Supreme Court
25 in all its wisdom are correct in their decisions

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GOVERNMENT OF THE UNITED STATES
ex rel. ROBERT SHABAN

74C 1760

-against-

Opinion

December 26, 1974

STANLEY ESSEN, DIRECTOR OF THE
BROOKLYN REHABILITATION CENTER
NEW YORK STATE DRUG ABUSE CONTROL
COMMISSION,

Respondent.

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PLATT, J.

Petitioner seeks a writ of habeas corpus to deliver him from the custody of the Brooklyn Rehabilitation Center on the ground that the revocation of his "after-care" status and imposition of "resident-status" was in violation of his constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Specifically petitioner claims that such revocation and imposition were "without (1) written notice of the claimed violation; (2) disclosure of evidence against him; (3) opportunity to be heard and present witnesses (4) right to confront and cross-examine witnesses; (5) a neutral and detached hearing body; and (6) a written statement of the fact finder's determination."

The following appear to be the facts from petitioner's papers and the testimony taken at the hearing on December 24, 1974:

On July 25, 1972, the petitioner, upon the request of his parents, was adjudged an addict (now known as a drug dependant person) under the New York Mental Hygiene Law and was committed in a civil proceeding in the Supreme Court, Kings County (Liebowitz, J.).

Thereafter the petitioner was placed in custody in the then NACC facility at Arthur Kill, Staten Island, and he remained there until December 1972 at which time he was released by NACC to "after-care" or outpatient status.

Petitioner's original certification of addiction was made by Dr. C. S. Rubenstein, a NACC doctor.

On March 28, 1973, petitioner pled guilty to a burglary charge in Part IAA of the Criminal Term of the Supreme Court, Kings County (Epstein, J.) and was directed to be re-examined at the NACC facility in Brooklyn. On April 2, 1973, the same Dr. C. S. Rubenstein certified the petitioner to be a non-addict. Thereafter Mr. Justice Epstein sentenced the petitioner to a five year probationary term.

On November 30, 1974, petitioner was arrested on certain robbery charges which, on December 3, 1974, were all dismissed for lack of identification and evidence.

Upon the dismissal of the charges a demand was made for the release of the petitioner but such request was denied on the ground that there was a NACC (now DACC) warrant lodged against the petitioner. A writ of habeas corpus was sought

from the Supreme Court, Kings County, on December 4, 1974 but was denied on that date by Mr. Justice Oliver D. Williams.

An order to show cause for an immediate hearing on the appeal and for leave to argue on the original record and documents was opposed by the respondent and denied by the Appellate Division, Second Department, on December 11, 1974, and petitioner was informed that the Appellate Division would be in recess from Friday, December 13, 1974 and that his appeal could not be heard until some time during February of 1975.

Petitioner claims that the revocation of his after-care and the imposition of his in-patient status is for a period of 90 days and that by the time his appeal comes on to be heard in the Appellate Division almost all of his custody period will have taken place. Accordingly, petitioner maintains that he has exhausted his remedies in the State courts and he is therefore entitled to petition for the instant writ.

The statute pursuant to which the revocation of petitioner's after-care status and the imposition of his resident-status was made is Section 81.30 of the New York State Mental Hygiene Law which provides in part that:

"* * * The commission shall establish regulations and standards for release and aftercare placement of drug dependent persons. The commission shall have power to order any drug dependent person from aftercare supervision to inpatient treatment."

Concededly the statute does not provide for either a written notice of the claimed violation nor a hearing prior to the revocation and imposition and it was conceded at the hearing by Mr. Sullivan, one of respondent's witnesses from DACC,

that no such notice or hearing were available or given to petitioner prior to such revocation and imposition and that petitioner did not receive any of the same.

In Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2609 (1972), the Supreme Court held in the case of a revocation of parole that due process required the following:

- (i) written notice of the claimed violation;
- (ii) disclosure of the evidence against the alleged violator;
- (iii) an opportunity to be heard and to present witnesses and documentary evidence;
- (iv) the right to confront and cross-examine adverse witnesses;
- (v) a neutral and detached hearing body; and
- (vi) a written statement by the factfinders as to the evidence relied on and the reasons for revocation.

The Appellate Division, Fourth Department, in a unanimous decision in Ball v. Jones, 43 A.D. 2d 281, 351 N.Y.S. 2d 199 (Jan. 17, 1974), said the foregoing minimum requirements were applicable to the revocation of the after-care status and the imposition of resident status in the case of a formerly certified narcotic addict such as the petitioner in the case at bar. While such decision is on appeal to the Court of Appeals and hence may not be regarded as a final statement on the law in this State, (see also CPLR § 5519), nonetheless it is the most authoritative statement on the question in this jurisdiction at this time.

Respondent argues that petitioner's application should be denied because he has not exhausted his State court remedies. For all practical purposes, however, petitioner has no further adequate available State remedy. He has been remanded to the custody of DA33 for a 90-day period and during most, if not all of such period the State Appellate Courts are closed to him for the purpose of review of the denial of his petition for a writ of habeas corpus. Under such circumstances the exhaustion is not mandated "where state procedures do not provide swift review of petitioner's claims." Jonet v. Tubman, 360 F.Supp. 1293, 1300 (S.D.N.Y. 1973).

The next question is whether a single Federal District Judge has jurisdiction to pass upon the constitutionality of a State statute in a habeas corpus proceeding in view of the requirement for a three-judge court under 28 USC § 2281 where the constitutionality of State statutes is called into question. The Federal courts have repeatedly held "that § 2281 has no relation to habeas corpus proceedings" and that a single judge is sufficient to make such a determination in such a proceeding. Wilson v. Gooding, 431 F.2d 855 (5th Cir. 1970); U.S. ex rel Murray v. Owens, 341 F.Supp. 722 (S.D.N.Y. 1972); United States v. York, 281 F.Supp. 8, 12 (D.C. Conn. 1968); Scott v. Dist. Attorney, Jefferson Parish, State of Louisiana, 309 F.Supp. 333 (E.D. La. 1970), aff'd 437 F.2d 500; Bell v. Horgisto, 345 F.Supp. 1392 (N.D. Cal. 1972); U.S. ex rel Murphy v. Warden of Clinton Prison, 29 F.Supp. 486, 489 (N.D. N.Y. 1939), aff'd 108 F.2d 861 (2d Cir), cert. denied, 309 U.S. 661, 60 S.Ct. 583;

U.S. ex rel Laino v. Warden of Wallkill Prison, 246 F.Supp.72, 93 N. 16 (S.D.N.Y. 1965), aff'd 355 F.2d 203 (2d Cir. 1965); U.S. ex rel Watkins v. Com. of Pa., 214 F.Supp. 913 (W.D. Pa. 1963); Tender v. Cox, 317 F.Supp. 33 (D.C. Va. 1970).

Thus it would seem clear that this Court has the power to pass upon the constitutionality of Section 81.30 of the New York State Mental Hygiene Law in this habeas corpus proceeding without first convening a three-judge court under 23 USC § 2261.

There is no question in this Court's mind that Ball v. Jones, 43 A.D. 2d 281, 351 N.Y.S. 2d 199 (4th Dept. 1974), was correctly decided and that Section 81.30 of the New York State Mental Hygiene Law does not meet the minimum requirements of the Fourteenth and Fifth Amendments of the United States Constitution. It is not necessary at this juncture to delineate the precise requirements needed at a preliminary and/or a final hearing prior to revocation of after-care status to satisfy the Due Process Clause. (See discussions in Morrissey v. Brewer, supra, and Ball v. Jones, supra). Suffice it to say that for the purposes of petitioner's writ, no written notice of his alleged violation and no opportunity to be heard were accorded to him and in this Court's view this is enough to require the present writ to be sustained.

SUBMIT ORDER.

Thomas C. Platt
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GOVERNMENT OF THE UNITED STATES
ex rel ROBERT SHABAN

Petitioner

O R D E R

- against -

74 C 1760

STANLEY ESSEN, DIRECTOR OF THE
BROOKLYN REHABILITATION CENTER;
NEW YORK STATE DRUG ABUSE CONTROL
COMMISSION

Respondents

Upon reading the petition of JOEL H BRETTSCHEIDER,
attorney for the Petitioner, ROBERT SHABAN, duly verified the
13th day of December 1974, and the matter having been regularly
brought on for hearing upon the issues joined therein, and the
same having been duly heard and submitted, and due consideration
having been had thereon, it is by this Court now here

ORDERED, that the Writ of Habeas Corpus herein be,
and the same is hereby sustained, and the relator, ROBERT
SHABAN, be, and he hereby is, released and discharged from the
custody of the respondents, Stanley Essen, Director of the
Brooklyn Rehabilitation Center, the New York State Drug Abuse
Control Commission, and the New York State Drug Abuse Control
Commission Arthur Kill Facility, Staten Island, New York; and it
is further

ORDERED, that the NEW YORK STATE DRUG ABUSE CONTROL
COMMISSION, be and it hereby is, directed, forthwith, to
release and discharge from its custody ROBERT SHABAN, the above
named relator, *to after care status to which he was released*
by DACC in December 1972
Dated: Brooklyn, New York
December 24, 1974

181 Thomas C. Shatt

United States District Judge

Dated: December , 1974

LEWIS ORGEL

Clerk
A-62

by _____
Deputy Clerk

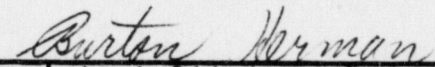
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ANNA M. VELEZ , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellant
herein. on the 3rd day of March, , 1975, she served
the annexed upon the following named person :

JOEL H. BRETTSCHEIDER, ESQ.
Attorney for Appellee
26 Court Street
Brooklyn, New York 11242

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
3rd day of March, , 1975


Assistant Attorney General
of the State of New York

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